STATE OF MICHIGAN

COURT OF APPEALS

FOREST WOLFROM and
CHARLOTTE WOLFROM,

Plaintiffs-Appellants,

v

HILLCREST MEMORIAL
GARDENS ASSOCIATION,

Defendant-Appellee.

UNPUBLISHED
April 6, 1999

No. 204746
Shiawassee Circuit Court
LC No. 96-060280 NO

Before: Jansen, P.J., and Holbrook, Jr., and MacKenzie, JJ.

MacKENZIE, J. (dissenting).

I respectfully dissent because I conclude (1) that any danger associated with the step was open and obvious, and (2) that the step did not pose an unreasonable risk of harm despite the obviousness of the danger.

Although the step and the ground level were painted the same color, the area in question was well-lit. Therefore, even while descending the step, an average person of ordinary intelligence, upon casual inspection, would recognize a 5 ¼-inch elevation change. See *Novotney v Burger King Corp*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). Moreover, a typical person descending the step would have earlier ascended the step to access defendant's business, and plaintiffs admit that the step was readily apparent upon ascent. The undisputed obviousness of the step to those ascending, combined with the adequate lighting, leads me to conclude that any danger associated with the step was open and obvious as a matter of law.

This conclusion is reinforced by *Maurer v Oakland County Parks & Recreation Dep't (After Remand)*, the companion case to *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995). In *Maurer*, as in the instant case, the plaintiff alleged that she was unable to discern the change in elevation between two different levels of a walkway and that the defendant was negligent for, among other things, "failing to mark the step with a contrasting color." *Id.* at 618. This Court held that there was a question of fact regarding whether the danger associated with the step was open and obvious because, just as plaintiff alleges in the instant case, a user of the step easily got the impression that the

entire area was flat. *Maurer v Oakland County Parks & Recreation Dep't*, 201 Mich App 223, 227; 506 NW2d 261 (1993), rev'd sub nom *Bertrand, supra* at 621. The Supreme Court reversed, implicitly concluding that the danger associated with similarly-painted floor levels of different elevations was open and obvious. *Bertrand, supra* at 618-621.

The *Bertrand* Court, after implicitly concluding that the danger associated with the step was open and obvious, focused on whether the danger associated with the step was unreasonable in spite of its obvious nature. *Id.* at 618-621. If an obvious risk of harm remains unreasonable – in other words, if an invitor anticipates harm in spite of the obviousness of the danger – the invitor may be obligated to take steps intended to enhance the protection of invitees. See *Bertrand, supra* at 611, and *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). In *Hottmann v Hottmann*, 226 Mich App 171, 176; 572 NW2d 259 (1997), our Court framed this inquiry as whether "the risk of falling . . . is eliminated by awareness of the hazard." Here, awareness of the hazard indisputably eliminates the risk of falling, since the risk results only from *a failure to see* the step and not from any inherent defect in the step. Once a person sees the step, a safe descent can be assumed. For this reason, I disagree with the majority's implication that even if the danger associated with the step was open and obvious, there would still be a question of fact regarding whether the risk of harm was unreasonable. As indicated in *Bertrand, supra* at 621, where the plaintiff's "only asserted basis for finding that the step was dangerous was that she did not see it," the risk of harm posed by the steps in question was not unreasonable as a matter of law.

I conclude that the open and obvious risk of harm was not unreasonable as a matter of law and would therefore affirm.

/s/ Barbara B. MacKenzie